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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

-) IB Docket No. 95-91
-) GEN Docket No. 90-357
-) RM No. 8610
-)
-) PP-24
-) PP-86
-) PP-87

Establishment of Rules and Policies for the
Digital Audio Radio Satellite Service in the
2310-2360 MHz Frequency Band

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COMMENTS OF CITIZENS FOR A SOUND ECONOMY FOUNDATION

Citizens for a Sound Economy Foundation (CSE Foundation) hereby submits these comments regarding the establishment of rules and policies for DARS service. CSE Foundation is a 250,000 member research and educational institution that advocates pro-consumer, market-based solutions to public policy problems. We believe that our members would benefit by an expeditious assignment of DARS licenses, with minimal restraints on the services that are provided.

Satellite DARS service could provide tremendous advantages for all consumers. Foremost among these is the prospect of significantly increased diversity in radio programming, a long-time goal of this Commission. Scores, if not hundreds, of new radio choices could be made available to every consumer in America. Ironically, this service is being developed -- as well as similar

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services in television and other media -- at a time when there is much hand-wringing in the press over a supposed reduction in media diversity. This proceeding shows that emerging technologies can ensure an abundance of choices for consumers, assuming the Commission does not block the way.

Strangely, however, many of the Commission's questions in this Notice are devoted to a discussion of whether this new service would hurt the profitability of existing providers. While we take no position on DARS' probable economic effect on broadcasters, we do question whether such considerations should be a primary concern of the FCC, or any government agency. It is a maxim in antitrust that the law should protect competition, not competitors. Similarly, the Commission's concerns should center on how to maximize consumer welfare, rather than on protecting any existing industries or firms.

As detailed in a recent report by the Progress and Freedom Foundation (PFF),¹ the Commission has had a long and regrettable history of stifling competition in telecommunications in order to protect existing competitors. The emergence of cable television, for example, was long delayed in a conscious attempt to protect existing broadcasters. However, a number of Commission officials stated that such criticism is unfair, since the FCC has long since abandoned such anti-competitive practices. This proceeding provides

¹Progress and Freedom Foundation, The Telecom Revolution: an American Opportunity, (Progress and Freedom Foundation, May 1995).

an opportunity to demonstrate is commitment to competition.

The Commission also asks a number of questions regarding how DARS should be regulated, including whether it should be subject to public interest requirements. We urge the Commission to take a skeptical view regarding imposition of public interest requirements from Washington.

As a first matter, such requirements are likely to impose substantial additional costs on this new service, thus actually reducing the potential benefits of this service to the public. Moreover, there is significant doubt as to whether imposition of administrative public interest requirements actually lead to better programming on behalf of consumers. The benefits of such requirements have increasingly been questioned in the academic literature.²

By contrast, we can think of no better way to ensure that DARS providers serve the public interest than by requiring them to compete in the marketplace for listenership. With a potentially intense competition among radio service providers, each will quickly learn what the listening public wants.

For similar reasons, we urge the Commission not to place any

²For a further discussion of this issue, see T. Krattenmaker and L. Powe, Regulating Broadcast Programming (MIT Press and AEI Press, 1994), at 143-174.

specific restraints on the provision of ancillary services. Given rapid changes in technology and potential consumer services, and uncertainty regarding relative consumer demand for specific services, the Commission is simply in no position to determine whether -- or to what extent -- such services should be offered to the public. We therefore believe the use of this spectrum should remain as flexible as possible, with a minimum of service requirements.

Lastly, the Commission asks a number of questions regarding how DARS licenses should be assigned, including specific questions regarding whether auctions should be used and whether additional applications for licenses should be accepted.

In looking at this issue, we note that the primary purpose of competitive bidding, as long articulated by the Commission itself, is not to maximize revenue to the federal government. Rather, it is to increase the efficiency and speed by which licenses are assigned.³

In this case, auctions would do little to meet these goals. Because all four current applicants can be accommodated in the spectrum at issue, there is no need to choose among mutually exclusive applicants, and therefore few gains in efficiency or speed

³See, i.e., Even Kwerel and Alex D. Felker, Using Auctions to Select FCC Licensees, OPP Working Paper #16, May 1985.

to be had. There simply would be little point in an auction with the current applicant pool.⁴

An auction would be beneficial, however, if the applicant pool were expanded and there were mutually exclusive applications. For several reasons, however, we do not believe that expansion of the applicant pool is desirable.⁵

First, there is no equity argument for opening up the pool. The application window for this service closed nearly three years ago, after all potential applicants were given ample opportunity to file. Second, expansion at this point could discourage future research and investment in new and innovative services. The current applicants have spent the past several years developing DARS technology and working with the Commission to make the DARS service a reality. If new applicants were accepted at this stage, they would, in effect, be able to "free ride" on this investment. By diminishing the rewards for innovation and investment, the Commission would be diminishing the incentive for anyone to make similar efforts in the future.

⁴Potentially, an auction could help serve the more limited function of determining which frequencies and how much spectrum should be assigned to each applicant, using a dynamic bidding approach such as that employed in the recent auctions of PCS licenses. It is important that any such process, however, be structured carefully, to maximize efficiency. This may be an option the Commission would want to explore.

⁵We take no position on the Commission's proposed "option two": licensing less than the total amount of spectrum to the current applicants and auctioning the remainder. This option depends upon the amount of spectrum required to create a viable DARS service, an issue on which we will defer to others.

Lastly, a new round of applications would doubtless create a further delay in the implementation of DARS. Over five years have already passed since the first application for satellite DARS was received by the Commission. In that time, not one applicant has been permitted to offer service to the public. Reopening the applicant pool would lead to yet another delay of indeterminate length. Consumers should not endure such a further delay in the availability of this service.

Conclusion

The Commission has received substantial criticism in recent months -- from Congress and elsewhere -- for excessive delays in the authorizing new technologies, and for hindering competition in communications. The Commission would, unfortunately, lend credence to these criticisms if it acted here to further delay or to excessively regulate DARS service. Conversely, if it acts expeditiously to license DARS providers, with minimal restrictions, the Commission would show it can be a friend of competition and the consumer.

Respectfully submitted,

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